

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 03 September 2003

In the Matter of:

RAYMOND F. PHILLIPS,
Claimant

Case No.: 2000-BLA-825

v.

DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS,
Party-In-Interest

Appearances:

Andrew Delph, Esq.
Wolfe, Williams & Rutherford
Norton, Virginia
For the Claimant

Leslie J. Rodriguez, Esq.
Office of the Solicitor
Atlanta, Georgia
For the Director, OWCP

Before: Alice M. Craft
Administrative Law Judge

**DECISION AND ORDER GRANTING WAIVER OF RECOVERY OF OVERPAYMENT
OF BENEFITS**

This proceeding arises from an overpayment of benefits under the Black Lung Benefits Act, 30 U.S.C. § 901 et seq. and the implementing regulations found at 20 CFR Parts 725 and 404. Benefits under the Act are awarded to coal miners who are totally disabled due to pneumoconiosis and their dependents, and surviving dependents of coal miners whose death was due to pneumoconiosis. If benefit payments begin prior to the final adjudication of a claim and it is later determined that the claimant was ineligible to receive such payments, then the payments will be considered an overpayment which may be recovered in accordance with the provisions of the regulations. If the claimant seeks a waiver of recovery of the overpayment, before the Director is authorized to begin recoupment of the overpayment, the claimant has the right to a hearing. In

this case, the Claimant Raymond Phillips seeks waiver of an overpayment in the amount of \$28,022.10.

I conducted a hearing on this claim on June 27, 2002 in Charlotte, North Carolina. Both parties were afforded a full opportunity to present evidence and argument, as provided in the Rules of Practice and Procedure for Administrative Hearings before the Office of Administrative Law Judges, 29 CFR Part 18. At the hearing, Director's Exhibits 1-37 were admitted into evidence without objection. Transcript ("Tr.") at 5-6, 20-21. Counsel for the Director objected to Claimant's Exhibits ("CX") 1-5 because they were not exchanged in advance of the hearing. I ruled that the exhibits, which contained updated information about income, expenses and assets, would be admitted, but offered to hold the record open for rebuttal exhibits. Tr. at 6-7. No other objections were made to the introduction of those exhibits into evidence by counsel for the Director. Tr. at 14-18. At the close of the hearing, counsel for the Director decided not to submit rebuttal exhibits, and the parties agreed to submit the evidence without closing arguments or post-hearing briefs. Tr. at 30. Consequently, the record was closed at hearing.

In reaching my decision, I have reviewed and considered the entire record pertaining to the request for a waiver, including all exhibits and the testimony at the hearing.

PROCEDURAL HISTORY

Claimant filed a claim for Black Lung benefits on September 26, 1977. *See* DX 3 at 2. The Office of Workers' Compensation Programs ("OWCP") initially determined that Claimant was eligible for benefits on March 25, 1981. DX 1. OWCP determined that Claimant would receive interim benefits at the rate of \$419.60 per month starting on January 1981. The Claimant was informed that his benefits may be terminated if an adverse final decision was issued regarding his interim payments or if Claimant failed to pursue his claim with reasonable diligence. DX 2.

The responsible operator, Bishop Coal Company, appealed the award of benefits, and on May 12, 1982, the Director referred Claimant's claim to the Office of Administrative Law Judges. *See* DX 3 at 1. After a hearing, Administrative Law Judge Robert J. Brissenden issued a Decision and Order rejecting Claimant's claim on January 27, 1986. DX 3. After further appeals and remands, the claim was finally denied in a Fourth Decision and Order on Remand, DX 23, upheld by the Benefits Review Board on August 20, 1999, DX 25. The Board denied reconsideration on October 22, 1999. DX 26.

Claimant received interim benefit payments from January 1981 through January 1986, when his claim was first denied by Judge Brissenden. DX 2. Claimant was first notified of the overpayment in the amount of \$28,022.10 by letter dated February 28, 1986. DX 27. By letter dated March 7, 1986, Claimant, through counsel, requested that OWCP not take any action with regard to the reported overpayment of \$28,022.10 because an appeal was pending with the Benefits Review Board. Claimant further requested that should the Board agree with the Administrative Law Judge's finding of non-entitlement, then Claimant should repay no more than

\$8,023.00. DX 5. No further action was taken on recovery of the overpayment until after the Board issued its final decision on the underlying claim.

By letter dated February 14, 2000, Claimant was again informed that the he had received an overpayment and that the amount of \$28,022.10 would be recovered. DX 28, DX 30. The Director made an initial finding that the Claimant was not at fault in incurring the overpayment. DX 29. By letter dated March 12, 2000, Claimant requested that recovery of the overpayment be waived and submitted supporting documentation. DX 31. On April 11, 2000, the Director notified the Claimant that a waiver of the overpayment could not be granted because Claimant had the ability to repay the debt. DX 32. By letter dated May 3, 2000, Claimant requested a hearing before the Office of Administrative Law Judges. DX 33.

On June 2, 2000, the claim was referred to the Office of Administrative Law Judges and was assigned to Administrative Law Judge Pamela Lake Woods. Initially the responsible operator was named as a party Employer, but was dismissed at its request as it never made any payments. While the case was pending before Judge Woods, the Department of Labor promulgated extensive revisions to the black lung regulations intended to be applied to cases pending as of January 19, 2001. *See* 65 Fed. Reg. 79920 et seq. (2000). Pursuant to a *Preliminary Injunction Order* dated February 9, 2001, entered in the case of *National Mining Association v. Chao*, 145 F.Supp.2d 1 (D.D.C. 2001) adjudication of claims that were pending before the Office of Administrative Law Judges was stayed absent a finding that the new regulations would not affect the outcome of the case. Subsequently, on April 19, 2001, Judge Wood issued an Order Determining Stay Unnecessary and found that the amendments to the challenged regulations would not be outcome determinative. By letter dated June 13, 2001, Claimant, through counsel, requested a continuance of the claim, in part because the Claimant had reapplied for benefits under the new regulations. On June 15, 2001, Judge Wood sua sponte issued an Order Canceling the Hearing and Returning the Case to Docket in the interest of judicial economy because it was the only case remaining on her docket in Charlotte, North Carolina. On March 12, 2002, this claim was reassigned to me and set for hearing on June 27, 2002. Counsel did not request any further continuance and the hearing proceeded as scheduled.

APPLICABLE STANDARD

The regulations provide in pertinent part:

There shall be no . . . recovery of an overpayment in any case where an incorrect payment has been made with respect to an individual:

(a) Who is without fault, *and* where

(b) Adjustment or recovery would *either*:

(1) Defeat the purpose of Title IV of the Act, *or*

(2) Be against equity and good conscience.

20 CFR § 725.542 (emphasis added). 20 CFR § 725.543 states that the standards for determining whether the claimant is entitled to a waiver of recovery of overpayment shall be the same as those applied by the Social Security Administration under 20 CFR §§ 404.506 through 404.512.¹

Recovery defeats the purpose of the Act when it would “deprive a person of income required for ordinary and necessary living expenses.” 20 CFR § 404.508(a). Recovery is against equity and good conscience if the claimant “[c]hanged his or her position for the worse . . . or relinquished a valuable right . . . because of reliance upon notice that payment would be made . . .” or “[w]as living in a separate household from the overpaid person at the time of the overpayment and did not receive the overpayment.” 20 CFR § 404.509(a). Claimant bears the burden of establishing his entitlement to a waiver. *McConnell v. Director, OWCP*, 993 F.2d 1454, 1457 (10th Cir. 1993); *Valente v. Secretary of Health & Human Services*, 733 F.2d 1037, 1042 (2d Cir. 1984). If the administrative law judge finds that the claimant is at fault, then there is no need to consider whether recovery would be against equity and good conscience or defeat the purpose of the Act; the waiver must be denied. 20 CFR § 725.542; *Hampton v. Director, OWCP*, 11 B.L.R. 1-118, 1-119 (1988).

ISSUES

The Claimant has not challenged the amount of the overpayment due, and the Director has conceded that the Claimant was not at fault for the overpayment. Therefore the issues before me are:

1. Whether Claimant is entitled to a waiver of the overpayment because recovery of payment would defeat the purpose of the Act.
2. Whether Claimant is entitled to a waiver of the overpayment because recovery of payment would be against equity and good conscience.

DX 34; Tr. at 5.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Summary of the Evidence

In a letter to the Department of Labor dated March 12, 2000, requesting a waiver of the overpayment, Mr. Phillips stated:

¹Revisions to Part 725 of the regulations were among the revisions effective January 19, 2001. The previous version of this rule incorporated rules found at 20 CFR §§ 410.561-410.561h. As many of the rules in Part 404 and 410 are similar, and Part 404 incorporates principles found in case law under Part 410, much of the prior case law may still be applied.

First and foremost I want to state that I am a 76 year old disabled coal miner. . . .

Due to circumstances I have relocated so I can be close to my daughter. My wife and I need her near to help as we are aging and becoming more and more dependent.

Since our move I have purchased a house and now I have a mortgage payment. This house is financed for fifteen years. With the purchase some much needed repairs have been done. There was a need to replace windows and a door. A utility building was bought for storage. Damaged trees were removed. Also some furniture including a gas stove and television were replaced. Due to age and condition my vehicle has been replaced also.

The money I have invested with Merrill Lynch has been saved for use in the event that my wife or I were to need nursing home care or in home health care. It will also be used for funeral expenses at our death.

I feel that it would be a great disservice to me and my loved one if you were to take away this benefit that I have worked so hard and long to receive.

. . .

I would greatly appreciate it if you would take into consideration my age and disability. . . .

Mr. Phillips enclosed his responses to the Overpayment Recovery Questionnaire provided by the Department of Labor, listing income of \$1951.05 per month, expenses of \$1794.00 per month, and assets of \$22,523.63, with supporting documentation. DX 31. The District Director denied the waiver and recommended that Mr. Phillips pay a lump sum payment of \$11,800.00 and monthly payments in the amount of \$150.00 beginning on May 15, 2000. DX 32. In his response, Mr. Phillips declined to pay and requested a hearing. He stated that taking the overpayment would be devastating to him and his wife, and an injustice. DX 33.

Mr. Phillips testified at the hearing, by which time he was 78 years old. His wife is his only dependent. He is a veteran of World War II. He said that it would be rough for him to repay the overpayment because his house needs a lot of work, including a new roof, and he could not make his usual charitable contributions or buy \$50 savings bonds for his eight grandchildren and great grandchildren on their birthdays and at Christmas. He could not say that he would be forced to sell his house or his car. On cross examination, he testified that he bought his current house in 1997, having sold his previous house for \$40,000.00. He used \$20,000.00 for a down payment on the new house, and spent the other \$20,000.00 for improvements on the house, and a car. He has a mortgage on the house, which, according to his answers to interrogatories, DX 36, has a balance of about \$38,000.00. He has a retirement annuity account, which he bought as a rainy day fund. Tr. at 12. Mr. Phillips' daughter, Wanda Johnson, also testified at the hearing. She helped prepare the Claimant's exhibits by reviewing his records, compiling expenses for a

year, and dividing by 12 to derive monthly expenses. Tr. at 25-26.

The parties submitted updated evidence of the Claimant's recent monthly income and expenses, and assets. The following charts show Claimant's income and expenses:

Monthly Income (CX 1)

Claimant's Social Security Benefits	\$ 1,099.00
Social Security Benefits of Claimant's Spouse	\$ 562.05
Claimant's Pension Benefits	\$ 382.00
Total	\$ 2,043.05

Monthly Expenses (CX 1)

Auto Insurance	\$ 47.00
Home Insurance	\$ 33.00
Auto Maintenance	\$ 75.00
Home Maintenance	\$ 93.81
Lawn Maintenance	\$ 150.00
Entertainment	\$ 75.00
Gifts	\$ 95.00
Donations	\$ 80.00
Church Tithe	\$ 50.00
Medical (not covered by insurance)	\$ 100.00
Eye and Dental	\$ 50.00
Toiletries	\$ 35.00
Hair care	\$ 50.00
Mortgage	\$ 639.13
Food	\$ 350.00
Clothing	\$ 200.00

Pharmaceuticals	\$ 96.00
Utilities	\$ 161.56
Total	\$ 2,380.50

Thus Mr. Phillips' expenses exceed his income by \$337.45 per month. Even if the voluntary payments of \$175.00 for gifts and charitable contributions are excluded, his expenses still exceed his income.

Claimant's assets include his house, valued for real estate tax purposes at \$72,800.00, DX 35, with a mortgage balance of \$38,000, DX 36; a car valued at \$9240.00, DX 37; a checking account balance of \$122.87, Tr. at 26, CX 5; a savings account balance of \$877.46, CX 4; an annuity contract purchased for \$25,000.00, but valued at \$15,906.72 due to losses in the stock market, *see* Tr. at 13, with a surrender value of \$2,500.00, CX 2; and \$18,000.00 in a fixed account from a settlement in an automobile accident case, Tr. at 22, DX 36, DX 37.

Whether Recovery of the Overpayment Would Defeat the Purpose of the Act

To establish that recovery of an overpayment would defeat the purpose of the Act, Claimant must show that recovery would deprive him of income required for ordinary and necessary living expenses. "Ordinary and necessary living expenses" are defined as including food, clothing, rent, mortgage payments, utilities, maintenance, insurance, taxes, installment payments, medical costs, expenses for the support of others for whom the Claimant is legally responsible, and other miscellaneous expenses which may reasonably be considered as part of the individual's standard of living. 20 CFR § 404.508(a)(1)-(4). A fact-finder must consider the impact of the entire financial circumstances of the household, including the combined income and expenses of both claimant and spouse as well as jointly and separately owned assets of both, in determining claimant's ability to repay the overpayment. *Keiffer v. Director, OWCP*, 18 B.L.R. 1-35 (1993); *Ashe v. Director, OWCP*, 16 B.L.R. 1-109, 1-112 (1992). However, the fact-finder's analysis is limited to only current income and expenses and not prospective income or expenses. 20 CFR § 404.508; *Keiffer*, 18 B.L.R. at 1-39. A change in circumstances can be addressed by a request for modification. *Keiffer*, 18 B.L.R. at 1-40.

I find that the Claimant has shown that his monthly expenses documented in the record, without considering the voluntary payments of gifts and charitable contributions, are ordinary and necessary living expenses, and that they exceed his monthly income. When the District Director made his initial determination that Mr. Phillips could afford to repay \$11,800.00 immediately, and \$150.00 per month, the evidence in the file indicated that Mr. Phillips' monthly income exceeded his expenses, and his annuity contract was valued at \$18,531.66. *See* DX 31. The evidence now shows not only that his expenses exceed his income, but also that value of his annuity contract has declined, and further, that the surrender value of the annuity contract is only \$2500.00. CX 2. His only new asset is the \$18,000 he and his wife received in settlement for an automobile

accident.²

I conclude that in order to meet his ordinary and necessary living expenses, Mr. Phillips will need to call upon the funds in his annuity contract and the settlement from the automobile accident. Given the low surrender value of the annuity contract, the accident settlement is the most liquid asset which he can call upon for that purpose. The settlement money is therefore needed to pay for monthly expenses and emergencies. Based on the evidence of record, I find that repayment of the overpayment would defeat the purposes of the Act. Thus, I need not consider whether recovery of the overpayment would be against equity and good conscience.

Conclusion

I find that Claimant was not at fault in incurring the overpayment. I also find that Claimant's monthly income is not sufficient to pay his ordinary and necessary expenses, for which he will need his other assets. Therefore, recovery of the overpayment would defeat the purpose of the Act. Claimant is therefore entitled to a waiver of recovery of this overpayment.

ORDER

The Claimant's request for a waiver of recovery of the overpayment of \$28,022.10 is GRANTED. Claimant's attorney shall have thirty days (30) days to file an application for fees in accordance with the requirements of 20 CFR § 725.366. A service sheet showing that service has been made upon all parties, including the Claimant, must accompany the application. The parties shall have ten days following service of the application within which to file any objections.

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ALICE M. CRAFT
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: Pursuant to 20 CFR § 725.481, any party dissatisfied with this Decision and Order may appeal it to the Benefits Review Board within thirty (30) days from the date of this Decision by filing a Notice of Appeal with the Benefits Review Board at P.O. Box 37601, Washington, D.C. 20013-7601. A copy of this Notice of Appeal must also be served on Donald Shire, Esq., Associate Solicitor for Black Lung Benefits. His address is Frances Perkins Building, 200 Constitution Avenue, NW, Room N-2117, Washington, D.C. 20210.

²There is little information about the accident in the record, other than Mr. Phillips' responses to discovery indicating that he and his wife each received \$9,000.00 for personal injuries. DX 36, 37.